**TECQ DOCKET NO. 2012-0786-UCR**

**SOAH DOCKET NO. 582-12-6250**

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| **APPEAL OF THE CITY OF CRESSON'S** | § | **BEFORE THE** |
| | § | |
| **ORDER SETTING RATES FOR BFE** | § | **TEXAS COMMISSION ON** |
| | § | |
| **WATER COMPANY** | § | **ENVIRONMENTAL QUALITY** |
| | § | |

**THE CITY OF CRESSON'S EXCEPTIONS AND BRIEFS TO THE PROPOSAL FOR DECISION AND ORDER BY THE STATE OFFICE OF ADMINISTRATIVE HEARINGS**

TO THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

The City of Cresson files these exceptions and briefs to the Proposal for Decision and Order that were recommended for approval to the Texas Commission on Environmental Quality ("TCEQ") in TCEQ Docket No. 2012-0786-UCR, SOAH Docket No. 582-12-6250 on August 5, 2013 by the Administrative Law Judge ("ALJ").

## I.

## THE ALJ IMPROPERLY FAILS TO APPLY THE CLEAR LANGUAGE OF THE TEXAS WATER CODE

The Texas Water Code, Title 2. Water Administration, Subtitle B. Water Rights, Chapter 13, Section 13.187 ( p) states:

(p) Except to implement a rate adjustment provision approved by the regulatory authority by rule or ordinance, as applicable, or to adjust the rates of a newly acquired utility system, a utility or two or more utilities under common control and ownership may not file a statement of intent to increase its rates more than once in a 12-month period, unless the regulatory

authority determines that a financial hardship exists. If the regulatory authority requires the utility to deliver a corrected statement of intent, the utility is not considered to be in violation of the 12-month filing requirement.

The ALJ specifically found "it is true that BFE filed two statements of intent to change its rates within 12 months." This conclusion is totally supported by the evidence. However, the ALJ improperly concludes that BFE was permitted to file a second application because Cresson concluded that it did not have jurisdiction over the first application, dismissed it, and directed BFE to file a corrected application with the TCEQ. No evidence supports the premise that Cresson concluded it did not have jurisdiction over the original application. Cresson held a contested hearing on the original application. Cresson relied on the advice of TCEQ representatives to conduct this hearing, as it is entitled to do under The Texas Water Code, Title 2. Water Administration, Subtitle B. Water Rights, Chapter 13, Section 13.085. When Cresson held its contested hearing on the first application, BFE did not produce any knowledgeable witnesses or representatives to support its rate increase request. Cresson accordingly declined to approve BFE's rate request and Cresson's mayor communicated such to BFE. This communication is improperly characterized by the ALJ in its proposal for decision. It's exact language correctly and directly stated "This will allow you to submit your application directly to the TCEQ." because Cresson's mayor knew BFE had the unquestioned right to appeal to the TCEQ the actions of Cresson. BFE did not chose to timely appeal Cresson's decision. No request was ever made by Cresson for BFE to make any corrections to its filed statement of intent or other parts of its application. No inference was ever made to BFE by Cresson that any corrections were required. The ALJ can point to no evidence directing any corrections. Cresson's mayor pro-tem who present at all the involved proceedings testified in the contested hearing on this matter. He never testified that Cresson reached any such opinion that it had lost any jurisdiction and the ALJ can not point to any such testimony. He never testified that Cresson instructed BFE to correct its first statement of intent and the ALJ can not point to any such testimony. No evidence exists that any vote was ever taken by the Cresson City Council, the only body authorized to make such decisions, directing BFE to correct its statement of intent.

No evidence was presented by BFE that it even remotely considered Cresson's mayor's communication as directing it to correct its statement of intent. In Alfonso v. Skadden, 251 W. W. 3d 52 (Tex. 2008) the Texas Supreme Court held "We disagree with the court of appeals that it should have presumed something that the record in the underlying proceeding repeatedly showed was not true. The presumption supporting judgments does not apply when the record affirmatively reveals a jurisdictional defect." As required by the Supreme Court, BFE must be found to have violated the 12 - month filing prohibition. The second application, filed in violation of the 12 - month filing prohibition, is illegal and cannot be considered by either Cresson or the TCEQ. The current appeal, which is based on the second filing that violated the 12 - month prohibition, must be dismissed by the TCEQ.

## II.
## THE ALJ REFUSES TO FOLLOW THE RULINGS OF THE TEXAS SUPREME COURT AS INTERPRETED BY THE TEXAS ATTORNEY GENERAL

The Texas Supreme Court has said that even if valid under its own enabling legislation, an administrative rule may not be "inconsistent with the expression of the lawmakers' intent in statues *other* than those under which the regulations are issued." *State v. Jackson,* 376 S. W. 2d 341, 345 (Tex.1964) (emphasis added). Texas Attorney General Greg Abbott in his Opinion No. GA-0727 relied on this ruling to opine that state agencies such as the TCEQ must not create rulings that deviate from the Legislature's intent in statutes irregardless of where the statue exists relative to other statutes dealing exclusively with that agency.

In State v. Thomas, 766 S. W. 2d 217 (Tex. 1989) the Texas Supreme Court dealt with the the Public Utility Commission's attempt to not burden itself with laws concerning actions "in the courts." The Court made it clear that the Public Utility Commission, and other such agencies such as the TCEQ, that perform quasi-judicial functions, must abide by the requirements of statutes that address the courts. The Supreme Court's actual ruling states:

"The Commission argues that this constitutional provision only authorizes the Attorney General to take action "in the courts," and not in an agency. However, a ratemaking proceeding is a "contested case" within the meaning of the Administrative Procedure and Texas Register Act and, as such, is a formal adjudicative proceeding in which the agency performs in a quasi-judicial function. Tex.Rev.Civ.Stat. art. 6252-13a, §§ 3(2), 13. In creating the Public Utility Commission, the legislature effectively shifted the forum of original jurisdiction for challenging a utility's rates from the district courts to the agency. See Public Utility Regulatory Act, Tex.Rev.Civ. Stat. art. 1446c. Now, a lawsuit to challenge the reasonableness of a utility's rates can be properly "instituted" only by intervening at the agency level. See Tex.Rev. Civ.Stat. art. 6252-13a, § 19. The Attorney General cannot act "to prevent" unlawfully exorbitant rates unless he can begin by intervening before the agency.

This part of article IV, section 22 first appeared in the 1876 Texas Constitution. At that time, we did not have the proliferation of regulatory agencies that we now have. Even the Railroad Commission was not created until 1891. Tex. Const. art. X, § 2, interp. commentary (Vernon 1955). Many disputes that were once litigated in the courts are now, for all practical purposes, litigated in the agencies. That is where the evidence is heard and the record is made. By the time most such disputes reach the courts, they present themselves in a posture more akin to appellate review. See Tex.Rev.Civ.Stat. art. 6252-13a, § 19(d)(3). We conclude that article IV, section 22 uses the term "courts" in a generic sense to refer to an adjudicative forum. It is implied within the meaning of this constitutional provision that the Attorney General will be able to take action in the adjudicative forum of first jurisdiction regardless of whether the label attached to that forum is "court" or "agency."

The Attorney General of Texas has repeatedly stated that this means other similar provisions of Texas law that are binding on the courts are also binding on agencies such as the TCEQ.

(Texas Attorney General Letter Opinion No. 94-069, Texas Attorney General Open Records Decision No. 588).

The ALJ concludes that he can unilaterally ignore these Supreme Court decisions and Attorney General opinions since he finds no legislation "specifically" requiring the TCEQ to honor other state statutes even if they are relevant to the case before the TCEQ. The ALJ is wrong to substitute his legal opinion for that of the Texas Supreme Court and the Texas Attorney General.

The ALJ is required to determine if BFE Water, the party filing the present appeal, complied with the provisions of the Texas Business and Commerce Code §§ 71.101, 71.103, & 71.201. to allow it do conduct business in the State of Texas, such as filing the present appeal. The evidence shows it has not.

To accept the ALJ's Proposal for Decision on this point would mean the TCEQ concludes that parties that are explicitly prohibited from doing business in Texas may never the less file actions with the TCEQ in direct conflict with Texas Supreme Court rulings and the law.

BFE Development Corp., the legally entity holding the CCN, chose not to qualify BFE Water Company to do business in Texas. BFE Development Corp. chose to file the present appeal not in its name but in the name of BFE Water Company. Now it asks the TCEQ to ignore its choices. The TCEQ should deny the present appeal since BFE Water Company has no legal standing to do business in Texas nor to file the present appeal.

## III.
## THE ALJ IMPROPERLY CONCLUDES THAT BFE WATER IS ENTITLED TO A RETURN ON ITS DEVELOPER CONTRIBUTIONS

It is undisputed that the holder of the Certificate of Convience and Necessity under which BFE provides water service is BFE Development Corp. d.b.a BFE Water Company. It is further undisputed that the BFE Development Corp. is the developer of the subdivision in which essentially all of its customers are located. It is undisputed that BFE has the burden of proof in these proceedings. It is undisputed that BFE Development Corp. made the investments required

for these customers in its real estate development area to have retail utility water service. Even though BFE carries the burden of proof, the ALJ concludes that it is entitled to a return on the investment made by the developer because he concluded that no one gave cost-free property to BFE to provide water service.

The TCEQ does not permit returns on assets contributed or paid for by developers to be included in water rates. The logic is straightforward and simple. Developers sometimes invest in water systems to make the real estate they are trying to sell be more attractive to buyers, just as they sometimes invest in streets, curbs, sidewalks, security walls, and other attractions. The ALJ is correct to conclude that its illogical to think such investments are made without the ability of the developer to make a profit by recovering these investments. However, the question before the TCEQ is how these investments are to be recovered. The TCEQ has consistently held that it is inappropriate to allow a developer to recover this investment both by the increased value received by the developer when it sells its real estate and then a second time through a return embedded in the water rates the real estate purchasers are required to pay. In this case, the evidence shows that purchasers paid much more for their real estate because of the existence of BFE's water system. In fact, the owner of BFE testified that his development had been so enormously successful that with only about two thirds of his real estate lots sold that he had received over $2.4 million in proceeds, many times over the cost of the water system. BFE offers no proof why it should recover the cost of its water system a second time through regulatory rates. The ALJ is wrong to conclude it should be so further enriched. The TCEQ should direct that the rates approved for BFE should not include a return on the investments made by the developer.

## IV.
## THE ALJ IGNORES KNOWN AND MEASURABLE CHANGES IN ITS RECOMMENDATION CONCERNING RECOVERY OF RATE CASE EXPENSES

Subject to a final determination of whether rate case expenses are allowed in this case, the ALJ recommends that a surcharge be made based on BFE having 35 customers. BFE's Water

and Wastewater Utilities Annual Report for the Calendar Year Ended December 31, 2010 has been admitted into evidence. This sworn report reflects that BFE has 37 customers. The ALJ's recommendation should be adjusted to reflect the known and measurable number of customers, 37.

## V.

## THE ALJ IMPROPERLY CONCLUDES FIRE HYDRANTS ARE USED TO PROVIDE WATER SERVICE

The testimony of an officer of Cresson's Fire Department was that the six fire hydrants in BFE's water system have and continue to be used for fire fighting purposes. He also testified that no action had been taken by BFE as required by state law to remove these hydrants from fire fighting service. BFE testified that the fire hydrants are also used to flush the system. In its sworn Water and Wastewater Utilities Annual Report for the test year of 2008 that was entered into evidence, BFE reported that its lost water percentage from all losses only 0.72%, reflecting very little flushing of the water system. Testimony was given that the system could be flushed if instead of fire hydrants far less expensive flushing valves were installed. BFE provided evidence that the cost of the fire hydrants was $1,000 each, for a total of $6,000. BFE also provided evidence that the cost of a 2 inch gate valve was $125 each. Six such valves would cost $750. This amount, $750, should be included in BFE's original investment base as used and useful to providing water service, not the additional $5,250 that was invested for fire protection.

## VI.

## THE ALJ IMPROPERLY INCREASES THE RECOMMENDED RETURN DUE TO BFE SERVING A LOW GROWTH AREA

The ALJ found that he "sees no basis for deviating from the work-sheet methodology that the Commission has used in recent years to determine rate of return." The ALJ recommends increasing BFE's rate of return by 1% because it serves a low growth area. Section D of that worksheet defines low growth as "a. less that 5% customer growth over the last three years; OR

b. documentation of potential anticipated future customer growth of less than 5% over a three year period; declining population." The evidence shows that BFE is not in a low growth condition as defined by the very worksheet he says he supports. BFE's sworn Water and Wastewater Utilities Annual Reports for the years ending December 31, 2000 through December 31, 2010 were admitted into evidence. These reports contain BFE's customer counts at the beginning and ending of each year. These reports show customer counts as follows:

| Year Ending December 31, | Beginning of Year Connections | End of Year Connections |
|---|---|---|
| 2005 | 21 | 25 |
| 2006 | 25 | 31 |
| 2007 | 31 | 34 |
| Test Year 2008 | 34 | 35 |
| 2009 | 35 | 37 |
| 2010 | 37 | 37 |

Taking the most conservative calculations, in the three years prior to the test year BFE enjoyed a growth in connections from 21 to 34, or 62%. In the two years for which data was admitted after the test year, BFE enjoyed a growth in connections from 35 to 37, or 6% in only two years. Both of these growth rates exceed the 5% threshold to prohibit BFE from enjoying an additional 1% return due to low growth as defined on the work-sheet the ALJ says he is using.

Respectfully submitted,
THE CITY OF CRESSON

Ron Becker, Authorized Representative

CERTIFICATE OF SERVICE

I, Ron Becker, hereby certify that on the 26th day of August, 2013, a true and correct copy of this document was transmitted by electronic mail, in accordance with SOAH Order No. 1, to the parties listed below:

Bridget Bohac, Chief Clerk
TCEQ, Office of the Chief Clerk
P. O. Box 13087
Austin, Texas 78711 - 3087

Harold Scott Perdue
137 Constellation Drive
Cresson, Texas 76035

Kayla Murray
TCEQ, Environmental Law Division
P. O. Box 13087
Austin, Texas 78711 – 3087

Lambeth Townsend
Eileen McPhee
Lloyd Gosselink Rochelle & Townsend, P. C.
816 Congress Avenue, Suite 1900
Austin, Texas 78701-2478

Scott Humphrey
TCEQ, Office of Public Interest Counsel
P. O. Box 13087, MC – 103
Austin, Texas 78711 – 3087

Ron Becker